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# In the Supreme Court of the United States

October Term, 1962

No. 732

ROBERT C. BROOKS ..... PETITIONER

v.

MISSOURI PACIFIC RAILROAD COMPANY ..... RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

## QUESTION PRESENTED

Petitioner sets out the Question Presented as follows (Pet. 2):

> Whether, under Section 9(c) of the Universal Military Training and Service Act, returning veterans re-employed by their former employers are entitled to be restored only to that status or seniority which, it could be foreseen at the time they went into the service, they would be absolutely certain to achieve.

The Record, and the decision of the Court of Appeals, do not support the presentation of the question so stated. The question of law decided by the Court of Appeals that was dispositive of the appeal was this:

> Whether, under Section 9(c) of the Universal Military Training and Service Act, returning veterans re-employed by their former employers are entitled to be restored not only to that status and seniority that they would have automatically achieved as of right, but for the military interruption of the employment, but also are entitled to such status and seniority as appears in retrospect that there is a high probability they would have achieved?

## STATEMENT

The petitioner's employment by respondent, interrupted by military service, was an apprenticeship the successful completion of which required actual on-the-job training for 1040 working days. Also required was satisfactory performance in a correspondence course consisting of two written lessons a month and the demonstration of the proper aptitude in the work (R. 23-25). After his return from military service, he actually completed the apprenticeship on January 23, 1958. He was immediately thereafter employed as a journeyman machinist and assigned a seniority date as such coinciding with the date of completing his apprenticeship. In this suit he seeks a retroactive seniority date of November 3, 1955, which was stipulated to be the correct date *if* he was entitled to retroactive seniority (R. 18-20).

Had petitioner completed his apprenticeship on November 3, 1955, there was no obligation on the part of respondent under the collective bargaining agreements then in effect between it and the labor organization of which petitioner was a member to employ him as a journeyman (R. 47-48). Under Rule 37 (e) as it read at that time, a former apprentice established seniority as a mechanic only if retained in service upon completing the apprenticeship (R. 36-37, 62). The trial court found that the collective bargaining agreement "* * * appears to give the railroad some theoretical discretion in the employment of mechanics from the ranks of graduating apprentices, * * *" (R. 38). The Court of Appeals found on examination of the entire written collective bargaining agreement that "There is no contract rule which compels defendant to employ any particular graduate apprentice as a journeyman upon completion of his apprenticeship." (Pet. 24) The Court of Appeals was furnished, by agreement of counsel and at the Court's request in the course

of oral argument, complete copies of the applicable collective bargaining agreements. The District Court had the complete copies before it, but only parts were designated for formal inclusion in the Record (R. 37-38).

However, the District Court held that petitioner was entitled to the retroactive seniority date, resting its decision on the evidence that there were some apprentice machinists working in an upgraded position as machinists at the North Little Rock shops in November and December, 1955, (R. 21-22), and testimony that the Railroad Company has recognized that its right to upgrade an apprentice depended on the unavailability of qualified journeymen (R. 49-50). The obligation thus recognized was described as an election between hiring the available journeyman who had just finished his apprenticeship, or loss of the right to retain upgraded apprentices of that craft at that point (R. 52).

The District Court considered these facts to constitute a showing that petitioner would have been employed as a machinist at North Little Rock if he had finished his apprenticeship there on November 3, 1955, as a matter of right, and as an advancement in status that would necessarily have occurred simply by virtue of continued employment, as those concepts are enunciated in *McKinney v. Missouri-Kansas-Texas R. Co.*, 357 U. S. 265. However, while accepting the trial court's findings as to the shortage of machinists at North Little Rock in 1955 and that graduate apprentices were therefore readily employed, the Court of Appeals held that these findings did not support the conclusion that the apprentice's right to advancement was automatic so as to meet the test of *McKinney* (Pet. 24).

## ARGUMENT AGAINST GRANTING THE WRIT

The Court of Appeals did not hold, as suggested in the Petition, that the Act required that returning veterans be "* * * restored only to that status or seniority which, it could be foreseen at the time they went into service, they would be absolutely certain to achieve." (Pet. 2). The holding was simply that completion of the apprenticeship and employment as a journeyman would not have occurred by way of automatic progression as a matter of right if petitioner had remained continuously in his civilian employment. His claim did not meet the *McKinney* standard. These advancements would not neggssarily have occured to petitioner simply by virtue of continued employment. The employer's discretion preserved in the collective bargaining agreement to select journeymen from among graduate apprentices, although liberally exercised in time of shortage, is nonetheless the final test that petitioner and others similarly situated must meet before there is any right to employment as a journeyman or seniority in that capacity. It may be highly probable that claimant would have made the advancement to journeyman had he remained in the civilian employment, but *McKinney* made it clear that the test was one of automatic progression.

The Court of Appeals merely applied the clear language of *McKinney* to the facts of this case, and no reasonable interpretation of its decision would support the contention that it adopted a standard of "absolute certainty." The Record and the decision simply do not support or present the Question Presented as stated by petitioner (Pet. 2).

What petitioner really seeks here is a re-examination of the very principles that have been universally considered to be settled since the publication of *McKinney*. When *McKinney* was decided this Court had already devoted considerable

time to defining the limits within which the Act permits the veteran to reproduce what might have been but for his military service. See *Diehl v. Lehigh Valley*, 348 U. S. 960, *Ford Motor Co. v. Huffman*, 345 U. S. 330, *Oakley v. Louisville & Nashville*, 338 U. S. 278, *Aeronautical Indust. Dist. Lodge v. Campbell*, 337 U. S. 521, *Trailmobile Co. v. Whirls*, 331 U. S. 40, and *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U. S. 275. *McKinney* was the considered culmination of repeated review by this Court of the scope of the benefits conferred by the Act. There was nothing precipitate about that decision, nor is there any reason to suspect that it is not a correct pronouncement of the intent of Congress.

The lower federal courts have applied the rule of *McKinney* without difficulty, and there is no disagreement among the courts of appeals as to its meaning. See *Bassett v. Texas & Pacific Railroad Co.*, 258 F. 2d 819 (5 Cir., 1958), *Horton v. United States Steel Corp.*, 286 F. 2d 710 (5 Cir., 1961), *Jefferson v. Atlantic Coast Line Railroad Co.*, 303 F. 2d 522 (5 Cir., 1962), *Sularz v. Minneapolis, St. Paul & Sault Ste. Marie R. Co.*, 259 F. 2d 122 (8 Cir., 1958) and *Tilton v. Missouri Pacific Railroad Co.*, 308 F. 2d 531 (8 Cir., 1962).

Petitioner states that the decision of the Court of Appeals is inconsistent with the decisions of other courts of appeals, and adopts by reference its citation to those decisions contained in the petition for certiorari filed *Tilton*, No. 664, October Term, 1962 (Pet. 9). However, the cases therein cited were decided before *McKinney* and are hardly relevant on the question of whether the courts of appeals are in conflict on the meaning or application of that decision.

The real question presented on this Petition is whether this Court, on a Question Presented (Pet. 2) that is unsupported by either the Record or the decisions of the courts below,

should now review the correctness of *McKinney*. None of the considerations appearing in Rule 19 that prompt this Court to grant certiorari are shown here, nor is any argument advanced by petitioner directed toward demonstrating that *McKinney* was erroneously decided.

## CONCLUSION

The decision of the Court of Appeals is correct; it is in accord with the applicable decisions of this Court; the question decided by the Court of Appeals was settled by this Court in *McKinney;* and there is no conflict between the courts of appeals as to the meaning or application of the *McKinney* decision. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted,

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January, 1963.